United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

212

Nos. 21,444 and 21,445

JOHN F. ALLEN and
JOHN L. BARRINGER, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
(28 U.S.C. 1291)

PAUL M. CRAIG, JR.
Attorney for Appellants

Cr. No. 1468-66

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,444 and 21,445

JOHN F. ALLEN and
JOHN L. BARRINGER, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA
(28 U. S. C. § 1291)

BRIEF FOR APPELLANTS

INDEX

TABLE OF CASES

OTHER REFERENCE

I. Statement of Questions Involved

In the opinion of appellants, the following questions are presented:

1. Did the trial Court violate appellants' rights under the Sixth Amendment to the assistance of counsel during pre-trial line-up identification at the Police Headquarters and under the Due Process Clause by permitting the presentation at trial of evidence relating to such pre-trial identification on behalf of the Government?

2. Did the trial Court violate appellants' rights under the Sixth Amendment and under the Due Process Clause of the Constitution by permitting in-Court identification of the appellants without prior determination that such in-Court identifications were based upon observations of the suspects other than the improper line-up identification?

3. Did the trial Court violate appellants' Fifth Amendment privilege against self-incrimination by requiring appellants to put on certain clothing during the improper line-up identification?

4. Was the hearsay nature of evidence given by certain Government witnesses as regards determination of the license number of a vehicle such as constitutes prejudicial error to appellants' rights?

5. Did the trial Court violate the rights of the appellant John L. Barringer under the Eighth Amendment by imposing a 5 to 15 year sentence to run consecutively with the 12 to 36 year sentence then being served by this appellant?

II. Jurisdictional Statement

This Court has jurisdiction under 28 U.S.C. 1291 to review the final decision of the trial Court in the above case.

III. Statement of the Case

On November 4, 1966, the Security Liquor Store, located at 3813 Georgia Avenue, N. W., Washington, D. C. was held-up and robbed at about 3:45 P.M. by two persons in the presence of co-owner of the Security Liquor Store, Raymond F. Cunningham, and of Julius D. Murphy, an employee of the store. One of the two hold-up men carried a sawed-off shotgun, wore an Army field jacket, and had a mask pulled over his face, while the other wore a windbraker and sun glasses and carried a long-barrelled piston. About $ 110.00 were taken in cash from the cash register of the Security Liquor Store in the course of this hold-up.

Shortly after the two men had left the store, a delivery truck of the Beitzel Delivery Company pulled up in front of the Security Liquor Store. The driver of the truck was Samuel Evans and his helper Larry Williams. Instead of making the delivery, the truck, driven by Mr. Evans, proceeded north on Georgia Avenue after Mr. Murphy had informed the driver of the hold-up and had jumped into the cab. Proceeding north on Georgia Avenuein the truck, Mr. Murphy spotted two men he believed to be the two suspects who turned off to the right on Randolph Road, proceeding east in the direction toward Eighth Street. The truck driver then drove to Shephard Street, turned right on Shephard Street and again right on Eighth Street. Prior to reaching Eighth Street, Mr. Murphy slipped down in the cab of the truck so as to avoid recognition from the outside. As the truck turned on Eighth Street, the two

men previously spotted by Mr. Murphy had turned into Eighth Street and proceeded toward a passenger car with D. C. license tags. As the truck moved toward and past this passenger car, the helper yelled out the license number of the car. However, Mr. Murphy continued in his hiding position and therefore was unable to look out of the truck at that time whereas the driver, preoccupied with driving the truck, did not notice the license number nor any details of the suspects as he proceeded toward New Hampshire Avenue and thereupon back to the liquor store. Upon return to the liquor store, the license number, as allegedly yelled out by the helper, Mr. Williams, was given by Mr. Murphy to the police, who had arrived in the meantime on the premises.

Lateron, the police spotted a car at the intersection of Rhode Island Avenue and Florida Avenue, having a D. C. license number corresponding to that given to the police by Mr. Murphy, gave it chase and eventually arrested appellants in the 1200 block of Sixth Street, N. E. Appellants were then taken to Police Headquarters. Mr. Cunningham was thereupon informed of the capture of the suspects and was taken around 5:00 P.M. of the same day to the Robbery Squad room where he identified the appellants. After returning Mr. Cunningham to the store, the police then proceeded in a similar way with respect to Mr. Murphy, who, after being taken to the Robbery Squad by the police, also identifed the appellants at the Robbery Squad. No formal line-up was arranged for this identification at which only

appellants were present; Mr. Cunningham could not recall whether any other negroes were present at the Robbery Squad at the time of his identification while Mr. Murphy unequivocally stated that appellants were the only negroes in the room at the time of his identification. Both appellants were convicted on all counts charged in the indictment. In the course of the trial, the Government's witness, Raymond F. Cunningham, testified on direct to his pre-trial identification at the Robbery Squad and made an in-court identification of appellants. The pre-trial identification of Mr. Murphy was brought out on cross-examination after his in-court identification of appellants on direct. No determination was made by the trial Court whether the in-court identifications of Mr. Cunningham and of Mr. Murphy were merely the tainted fruits of the improper line-up identifications.

Both appellants also took the stand on their own behalf and appellant Allen produced three witnesses on his behalf as to his whereabouts at the time of the crime.

The sentence of 5 to 15 years imposed on appellant John L. Barringer on October 17, 1967, was to run consecutively with the sentence of twelve to thirty-six years then being served by this appellant.

IV. Statutes and Constitutional Provisions Involved

Chapter 28, United States Code, Section 1291.

"§ 1291. Final Decisions of District Courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; October 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348."

The United States Constitution

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Eighth Amendment

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

V. Statement of Points

1. The lower Court violated appellants' Constitutional rights under the Sixth Amendment by refusing to exclude from evidence the line-up identification at the Robbery Squad and the in-court identification after the appellants were exhibited to the witnesses before trial at an improper line-up for identification purposes in the absence of counsel.

2. The lower Court violated appellants' Constitutional rights under the Sixth Amendment by refusing to exclude from evidence the in-court identification of appellants by witnesses to whom appellants were exhibited before trial in the absence of counsel without a prior determination whether such courtroom identification is the fruit of the improper pre-trial identification or is based upon observations of the suspects other than the pre-trial identification.

3. The trial Court violated appellants' Constitutional rights under the Fifth Amendment by refusing to exclude evidence as to appellants' pre-trial identification at which time appellants were compelled against their will and without the assistance of counsel to put on certain clothes, not worn by them at the time of their arrest and in the possession of the police.

4. The trial Court committed prejudicial, reversible error by permitting the introduction of hearsay evidence as regards the determination of the license number of the car allegedly used as get-away car by the hold-up suspects.

5. The trial Court violated the Constitutional rights under the Eighth Amendment of appellant John L. Barringer by imposing a five to fifteen year sentence to run consecutively with a twelve to thirty-six year sentence then being served by this appellant.

VI. Summary of Argument

1. Evidence as to pre-trial line-up identification in the absence of counsel is inadmissible because it violates the rights under the Sixth Amendment. After being arrested, appellants were taken to the Robbery Squad at Police Headquarters. Without the assistance of counsel, appellants who were the only colored persons present, were identified at that time by the Government's witnesses Cunningham and Murphy who were brought to the Robbery Squad by the police after they were told by the police of the arrest of the suspects. The direct testimony of such line-up identifications by the witness Cunningham was clearly prejudicial to appellants' rights under the Sixth Amendment and the line-up itself was so unfair and improper as to violate appellants' rights under the Due Process Clause and therefore constituted reversible error. U. S. v. Wade, 87 S. Ct. 1926 (1967); Gilbert v. State of California, 87 S. Ct. 1951 (1956-1967); Wong Sun v. United States, 371 U.S. 471, 488; 83 S. Ct. 407, 417; Palmer v. Peyton, 359 F. 2d 199 (CA 4th Cir. 1966); Stovall v. Denno, 87 S. Ct. 1967.

2. The in-court identification of appellants by witnesses who also identified appellants at an improper pre-trial line-up in the absence of counsel, was inadmissible as violating the rights under the Sixth Amendment and Due Process Clause in the absence of clear and convincing evidence by the Government that the in-court identifications were based upon observations of the suspects other than the line-up identifications. The trial Court's admission into evidence of the in-court identification of appellants by the witnesses Cunningham and Murphy without such prior determination was clearly erroneous and prejudicial to appellants' rights. U. S. v. Wade, supra.

3. During the improper pre-trial line-up, appellants were compelled by the police to put on over the clothes they wore at the time of their arrest, an Army Fatigue jacket and a windjacket in the possession of the police. Such action, forced upon appellants without the assistance of counsel, not only aggravated the impropriety of the line-up itself but was clearly in violation of appellants' rights under the Fifth Amendment protecting them against self-incrimination and therefore was reversible error. U. S. v. Wade, supra (dissenting views); Schmerber v. State of California, 384 U.S. 757, 772-779, 86 S.Ct. 1826; Gilbert v. State of California, supra.

4. The testimony of the witnesses Evans and Murphy as to the manner in which the license number of the suspects' car was obtained, was clearly hearsay since they testified as to the statements of the only person, the witness Williams, who actually saw the license number and called it out to

the others in the truck. Since appellants were later on apprehended in a car having such license number, the admission of such hearsay evidence, which was crucial in the Government's case, to linking appellants to the crime, was clearly prejudicial and constituted reversible error.

5. Admittedly, a great deal of discretion is given to the trial Court in determining the sentence to be imposed. However, in the instant situation, appellant John L. Barringer was already serving a term of 12 to 36 years. By imposing a sentence of 5 to 15 years to run consecutively with such prior long-term sentence constitutes a cruel and unusual punishment in violation of the Eighth Amendment right. Appellant John L. Barringer is in his middle twenties. A term of 15 years superimposed on a term of 36 years, thus constitutes in effect life imprisonment for appellant Barringer. Since the statute for the crime for which appellant Barringer was convicted carried a maximum penalty of 15 years and since the normal life expectancy in prison is considerably less than 51 years, the sentence imposed on appellant Barringer constituted a cruel and unusual punishment in violation of his Eighth Amendment right.

VII Arguments

1. It is well settled that a pre-trial line-up or show-up for purposes of identification is a "critical stage" in criminal proceedings, entitling a defendant to the assistance of counsel under the protection of the Sixth Amendment. U.S. v. Wade, supra. In the instant case, the Government's witnesses were taken to the Robbery Squad Room within a matter of hours after the hold-up (Tr. 25, 26, 27) where the two appellants were seated in chairs by the wall, hand-cuffed to the chairs (Tr. 371/7, 371/8, and 371/9). Appellants were not only told to stand up by the wall and to move back and forth but were also compelled to put on coats (Tr. 371/10, 371/11, 371/12 and 371/13). The line-up in the Robbery Squad Room consisted of only the two suspects (Tr. 119), and appellants were the only negroes in the room (Tr. 124), Furthermore, appellants were separated from the officers in the Squad Room (Tr. 123). A more improperly suggestive line-up than the instant pre-trial identification is hardly thinkable since there could be no mistake as to the identity of the suspects in the Robbery Squad Room, considering also that Cunningham and Murphy were informed beforehand by the police of the capture of two suspects and were taken to the Robbery Squad in a police car for the sole purpose of identification of the two suspects (Tr. 44, 151). The witness Cunningham could not even recall on cross-examination whether the two suspects in the Robbery Squad Room were hand-cuffed (Tr. 45).

Thus, the pre-trial identification procedures in the instant case lacked even the most fundamental safeguards to assure objectivity

on the part of the witnesses in the identification. Quite to the contrary, the pre-trial identification of the instant case was not only clearly suggestive but involved an obviously improper identification in violation of the Constitutional guarantees. Deprived of the assistance of counsel as guaranteed under the Sixth Amendment right to possibly mitigate the impropriety of the proceedings, the pre-trial identification of appellants was in clear violation of their Constitutional rights. Consequently, it was reversible error to permit the witness Cunningham to testify in open court on direct as to the pre-trial identification (Tr. 25, 26, 27 and 28). Since the pre-trial identification took place on November 4, 1966 and the decision of U.S. v. Wade, supra, was decided only June 12, 1967, a few words appear appropriate as to the applicability of this decision in view of the Court's decision in Stovall v. Denno, supra, which held that the "Wade" and "Gilbert" decisions affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after the date of the decision. While it is difficult to understand how a Constitutional right can apply only after a certain date, as pointed out in the dissenting opinion of Justice Black in Stovall v. Denno, supra, the oral testimony by the Government's witness Cunningham as regards the pre-trial identification was clearly inadmissible since such oral testimony was given on July 6, 1967, i.e., subsequent to the date of the Wade decision. The Supreme Court in the Stovall v. Denno case, supra, was concerned only with the retroactive inapplicability in those cases in which a conviction was already obtained. This is clear from the

> "We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such over-riding significance as to make that distinction unsupportable." (emphasis added)

Obviously, if a defendant is denied the right of counsel at a pre-trial line-up, such error cannot be corrected subsequently by a subsequent line-up in the presence of counsel since the evil of the first, improper line-up cannot be eradicated by such subsequent proceeding. This is undoubtedly also the logic underlying the consideration of retroactivity in Stovall v. Denno, supra. Admittedly, no action could have been taken in June of 1967 in the instant case to eliminate the prejudicial error of the improper line-up and pre-trial identification involving appellants in November, 1966. However, a distinction must be made between the retroactive right to counsel at a critical pretrial stage of the proceedings, such as the pre-trial line-up, and the admissibility of evidence obtained from such improper pre-trial identification at a subsequent date, at which time the Constitutional rights of appellants had already been clearly established by intervening decisions. To exclude from the Government's case the evidence of the improper pre-trial identification and any possible tainted fruits resulting therefrom, was not only required but would not have involved any procedural difficulties at trial. Appellants constitutional rights involve overriding considerations over any detriment, the Government's case would have suffered from the exclusion of the improper evidence.

Consequently, it was clearly erroneous on the part of the trial court to admit into evidence the pretrial identification by the witness Cunningham over the objections of counsel for appellants (Tr. 21 to 25) and to refuse to grant appellants Motion for a Directed Verdict of Acquittal (Tr. 323/A and 324).

Furthermore, the pre-trial confrontation conducted in this case was so necessarily suggestive and conducive to mistaken identification and irreparable damage that appellants were denied due process of law, Palmer v. Peyton, supra; Stovall v. Denno, supra. In the instant case, appellants were the only two suspects in the room for puposes of identification. The witnesses were informed by the police prior to the identification that the two robbery suspects had been arrested and were taken by the police to the robbery squad room for the sole purposes of their identification. Thus, apart from appellants' rights under the Sixth Amendment, the pre-trial identification was so grossly unfair and suggestive in nature, devoid of the usual safeguards of normal line-up identifications, as to violate appellants' rights under the Due Process Clause of the Fifth Amendment.

2. The witnesses Cunningham and Murphy also made in-court identifications of appellants (Tr. 27, 28, 92 and 93). As pointed out above in paragraph 1 of the Arguments, the in-court identification was preceded by a pre-trial identification on the part of the same witnesses under circumstances clearly in violation of appellants rights under the Fifth and Sixth Amendments. Since the Government's case involved circumstantial

large extent by the courtroom identification, in fact the fruits of suspect pre-trial identifications which appellants were helpless to subject to effective scrutiny, such in-court identifications are admissible only if it is established by the Government by clear and convincing evidence that such in-court identification is based upon observations of the suspects other than the line-up identifications. U.S. v. Wade, supra; Murphy v. Waterfront Commission, 378 U.S. 52, 79, n. 18, 84 S. Ct. 1954. However, notwithstanding objection by appellants' counsel to the admissibility of the evidence, no determination out of the presence of the jury was made at the time of the trial whether the in-court identification was the fruit of a suspect pre-trial identification which the accused were helpless to subject to effective scrutiny at trial. Without such determination, particularly in the instant case where the pre-trial identification itself was in clear violation of appellants' rights under both the Fifth and Sixth Amendments, the Constitutional safeguards would be of little more than theoretical value to the accused who could be convicted as a result of an in-court identification which itself is merely the result of mistaken identification at a pre-trial line-up that defies all minimum standards for fairness and impartiality. Consequently, the in-court identification, without prior investigation to determine whether it was based on independent observation, violated appellants' rights under the Fifth and Sixth Amendments and constituted reversible error.

3. In the course of the line-up identification at the Robbery Squad Room, appellants were compelled against their will to put on two coats in the possession of the Government (Tr. 371/11, 371/12 and 371/13).

This was also confirmed by the Government's witness Murphy on cross-examination (Tr. 156). The Fifth Amendment protects any person against being compelled in any criminal case to be a witness against himself. In the instant case, appellants were without the assistance of counsel and there is no evidence that either of appellants waived the right of counsel. The surroundings at the time of the line-up dispells any notion of lack of extreme compulsion. Appellants were hand-cuffed to their chairs, surrounded by police officers and subjected to interrogation. They were told to stand up and had no choice but to put on the coats as requested by the police. The privilege against self-incrimination is liberally construed, Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602. A distinction has been made between compulsion to extort communications and exclusion of the body as evidence. Holt v. U.S., 218 U.S. 245, 31 S. Ct. 2. However, as even acknowledged in the majority opinion of the Supreme Court in Schmerber v. State of California, 384 U.S. 757, 86 S. Ct. 1826, such distinction is not readily drawn in many cases. In the instant case, the right against self-incrimination requires careful scrutiny and liberal application to be meaningful. The facts of the instant case do not involve a situation where a suspect is required to put on a blouse or other incriminating clothing in the course of a line-up that complies with all prerequisites of the Sixth Amendment and Due Process Clause of the Fifth Amendment. Quite to the contrary, the inherent inadequacies in the line-up proceedings at police headquarters of the instant case were compounded by compelling appellants to put on the incriminating coats, thereby increasing immeasurably

the chances of mistaken identification as a result of the violation of the Constitutional safeguards. Each case must be considered on its own facts. However, the applicability of each Constitutional right cannot be considered completely separate from the over-all situation and the possible simultaneous violation of other Constitutional rights. In the instant situation, appellants were compelled by the police to give incriminating evidence against themselves in the course of a line-up, which itself was in total disregard of appellants' rights under the Fifth and Sixth Amendments. Under these circumstances, there can be no doubt that the dissenting opinions of Chief Justice Warren, Justice Black, Justice Douglas and Justice Fortas in Schmerber v. State of California, supra, set forth the true interpretation and sound rationale in line with the very intentions of the framers of the Constitution. Accordingly, appellants' rights against self-incrimination were clearly violated by compelling them to put on the coats in the course of the improper pre-trial identification at police headquarters, and the admission into evidence of the identification based on such self-incriminating evidence was reversible error.

4. The admissibility of evidence in criminal cases is governed by the principles of the common law. In the instant case, the witness Murphy rode in a truck of the Beitzel Delivery Company, driven by Mr. Evans in the presence of his helper, Mr. Williams (Tr. 83, 84, 85, 86, 160, 161, 162, 163, 197, 198, 199.) The Government's witness Murphy had slipped down in the truck cab as the truck proceeded on Eighth Street to hide and to avoid recognition from the outside and consequently did not see the car allegedly boarded by the two suspects

or its license numbers (Tr. 109). Yet, a series of leading questions were propounded to the witness Murphy (Tr. 85) as to details of the car culminating in testimony as to what others had said with respect to the license number (Tr. 86); since the witness could not see the license number (Tr. 86, 87) such testimony was clearly hearsay. Inter alia, the witness testified over counsel's objection:

> "They passed the car and they called out the license number." (emphasis added)

Since neither the witness Murphy nor the driver of the truck saw the license number or the faces of the suspects (Tr. 91 and 165), this line of questioning involving hearsay evidence as to who said what about the license number of the car in question was clearly prejudical to appellants' rights. Certain testimony of the witness Evans is objectionable on the same ground. In answer to the question whether he noticed what the license plate was on the 1955 Ford (Tr. 165), he answered

> "I didn't take notice of it. My helper called it off".
>
> Q Did somebody call off the number?
> A Yes.

The admission of such hearsay evidence was clearly prejudicial to appellants because it was intended to establish to correctness of the hearsay in order to link appellants' subsequent arrest in the car, allegedly bearing the number yelled out by the helper, to the crime.

As pointed out above, neither the witness Murphy nor the truck driver Evans saw the license number of the car in question or the faces of the suspects. Hence, such hearsay evidence which was the most vital circumstantial evidence in the Government's case, assumes an even greater significance and was of such prejudicial character as to constitute reversible error. Kelley v. U.S., 99 U.S. App. D.C. 13, 236 F. 2d 746; Smith v. U.S., 70 App. D. C. 255, 105 F. 2d 778; Pinkard v. U.S., 99 App. D. C. 394, 240 F. 2d 632.

5. Appellant John L. Barringer, at the time of sentencing in the instant case, served a sentence of twelve (12) to thirty-six (36) years for another crime involving the killing of a police dog. As in the prior case, the maximum sentence of five (5) to fifteen (15) years was imposed in the instant case. Robbery, under the D.C. Code is punishable by a term of no less than six months and no more than fifteen years[1]. Thus, Congress did not intend "life-imprisonment" for the crime of robbery. Yet in fact a fifteen-year sentence, superimposed on a thirty-six year sentence is life imprisonment for appellant Barringer who is at present in his middle twenties.

Admittedly, the trial court is given a wide discretion in the sentencing. He may impose maximum sentence unless it can be demonstrated to be clearly prejudicial or contrary to established practices. On the other hand,

---

1. Title 22, Section 2901 of the D.C. Code (1967 Ed.) provides: "Robbery. Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years (Mar. 3, 1901, 31 Stat

penologists agree that one of the main purposes of incarceration is rehabilitation. There is no indication that Congress intended to deviate from such policy. Yet, for appellant Barringer, rehabilitation during his normal life expectancy is out of question[2]. Consequently, the imposition of a 5 to 15 year sentence to run consecutively with the 12 to 36 year sentence then being served, constituted unusual and cruel punishment in violation of his rights under the Eight Amendment. To impose upon appellant Barringer a sentence for robbery which deprives him of an opportunity for rehabilitation during his useful life, was clearly not intended by Congress since the maximum statutory term for such crime was fifteen (15) years. The aims of justice and purposes of incarceration are better served if appellant is given an opportunity, depending on good behavior, to look forward to freedom and a new life in society. Without such hope, imprisonment becomes for appellant the last stage of an irrevocably lost life. Nothing would be gained by society from such life imprisonment, yet the ranks of the incorrigible desperados would be swelled by one more person. The better view today is that the Eight Amendment requires a sentence to fit the crime within the avowed purposes of incarceration and protects an individual against such punishments as run counter these avowed purposes which are to be considered as "cruel and unusual". Accordingly, remand is respectfully requested on behalf of appellant Barringer to afford the trial court an opportunity for resentencing in line with a liberal interpretation of the Eight Amendment right.

2. The normal life expectancy of the average American male is at present 67 years, which is, however, considerably less for prison inmates.

VIII. CONCLUSIONS

WHEREFORE, appellants respectfully submit that:

1. The trial court was in error in admitting into evidence the pre-trial and in-court identifications based on improper line-up in violation of their Fifth and Sixth Amendment rights.

2. The trial court was in error in admitting into evidence the in-court identifications without prior determination that such in-court identifications were not the tainted fruits of the improper pre-trial identifications.

3. The trial court erred in admitting into evidence the pre-trial and in-court identifications, when appellants were deprived of their Fifth Amendment right against self-incrimination in the course of the line-up, itself clearly in violation of their Fifth and Sixth Amendment rights.

4. The trial court was in error in admitting into evidence certain critical hearsay testimony by Government witnesses, linking appellants to the crime by circumstantial evidence.

5. The trial court erred in imposing a five to-fifteen year sentence to run "consecutively" with a twelve to thirty-six year sentence then served by appellant Barringer.

For these reasons, appellants urge this Court to reverse the decision by the District Court.

Respectfully submitted,

Paul M. Craig, Jr.
Court-Appointed Attorney for Appellants
909 Watergate Office Building
2600 Virginia Ave., N. W.
Washington, D. C. 20037.

Tel. 333-0990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed, by first-class mail, postage prepaid, to the Office of the U.S. Attorney, Room 3136-C, United States Court House Bldg., 3d and Constitution Ave., N.W., Washington, D. C. 20001, this 2nd day of July, 1968.

By _____
Paul M. Craig, Jr.
Court-Appointed Attorney for Appella

REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,444 and 21,445

JOHN F. ALLEN and
JOHN L. BARRINGER, Appellants,

v.

UNITED STATES OF AMERICA Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
(28 U.S.C. 1291)

PAUL M. CRAIG, JR.
Attorney for Appellants

Cr. No. 1468-66

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,444 and 21,445

JOHN F. ALLEN, and
JOHN L. BARRINGER, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
(28 U.S.C. 1291)

REPLY BRIEF FOR APPELLANTS

The following Reply Brief is respectfully submitted pursuant to Rule 17 (d) and Rule 18 (c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit.

In this Reply Brief reference will be made to the topics in the Brief for Appellee.

I.

Appellee argues that the case should be remanded for a full hearing into the circumstances surrounding the out-of-court identifications of appellants and a determination by the trial court of the propriety of those identifications and of the subsequent in-court identifications.

Appellee thus admits that in the absence of the suggested full hearing, the in-court identification of appellants by the witnesses violated their Constitutional rights. However, the full hearing and determination by the trial court, suggested by appellee, after a full trial and subsequent conviction cannot cure the defects during the trial. Neither the trial judge nor the witnesses can erase from their memory the events of the trial involving a complete presentation of all the evidence. As a matter of fact, the improper suggestiveness at the pre-trial confrontation assumes even greater significance after a full trial because the subjective thinking of the witnesses as regards their correctness in the identification have become polarized. To revert at this point to a full hearing into the circumstances concerning the out-of-court identifications without new trial would expose appellants' Constitutional rights

to the danger of a subjective approach based on the entire evidence of the case. Furthermore, the Brief for Appellee conveniently overlooks the inherently improper procedure at the pre-trial confrontation in violation of appellants' rights under the Due Process clause. Even if it could be demonstrated that the in-court identifications were based upon observations of the suspects other than the line-up identifications, it was clearly reversible error to permit the witnesses to testify to the pre-trial identification when the latter took place under circumstances that defy even the minimum requirements of due process. Furthermore, it is respectfully submitted that any attempt to ascertain whether the in-court identifications were based upon observations other than the line-up identifications after a full trial, is impossible in practice since the witnesses' testimony will be shaded by events during the trial as well as their inherent desire to avoid any acknowledgement of possible errors on their part.

The fallacy of the argument as to the "overwhelming nature of the evidence" against appellants, even without the in-court identification and the testimony as to out-of-court pre-trial identification is obvious. Constitutional rights are not dependent on nor tested by the quantum of otherwise possibly admissible evidence, particularly circumstantial evidence. Quite to the contrary, where the Government claims to have an extraordinarily strong case, as urged in the instant situation, compliance with procedures safeguarding the Constitutional rights of the suspects would appear to be of little harm to

the Government's case. On the other hand, the Constitutional rights of an accused, confronted by such "overwhelming" evidence must be protected to an even greater extent lest the quantum of evidence in the hands of the Government becomes a substitute as yardstick for the applicability of the Constitutional rights with dire consequences to the entire Constitutional system.

II.

Appellee argues that it was not improper for the police to dress appellants in clothes found in their car, during the robbery squad confrontation, and therefore that it was not a violation of appellants' rights under the Fifth Amendment to compel appellants against their will to put on clothing at Police Headquarters during the totally improper pre-trial identification. The fallacy in appellee's arguments stems from the contention that to compel a suspect to put on clothing against his will can never violate the Fifth Amendment. Assuming, arguendo, that some such practices have been condoned heretofore, the question of whether in fact a Fifth Amendment violation is involved , depends of course on the particular circumstances. The particularly prejudicial pre-trial identification of appellants must be considered in this context to determine whether appellants' Constitutional rights under the Fifth Amendment were violated Since the pre-trial identification of appellants did not comply with even the barest safeguards under the Due Process clause (appellants were the only negroes in the room, were handcuffed to the chairs and were ordered to do certain things by the police officers in the presence of the witness), the question

of violation of the Fifth Amendment must be carefully scrutinized and considered, not standing by itself, but in the light and in its impact on the entire, totally improper pre-trial identification proceedings. Viewed in that light, there can be no doubt whatsoever that the insistence by the police, forcing appellants to put on clothing, forced appellants not only to testify against themselves but in fact may have been the catalyst, if not the initial seed, resulting in the identification of appellants by the witnesses as the actual offenders. To condone such procedure would maintain the protection under the Constitutional guarantees only in name.

III.

Appellee further argues with respect to the stestimony by two witnesses that a third witness "called out the license number" of a car, was not inadmissible hearsay when the declarant testified to what that number was.

Appellee admits that there were "some elements of hearsay in the testimony of the witnesses Murphy and Evans" but contends "any conceivable error in admitting that testimony would have been harmless." Such approach, however, cannot be sanctioned in the instant case because the license number of the vehicle was a critical piece of evidence in the entire chain of circumstantial evidence, attempting to link appellants to the crime. One only has to consider that neither the witness Evans nor the witness Williams were present at the time of the crime and thus had never seen the persons involved in the hold-up. Only the witness Murphy had an opportunity to see the two persons

who entered the store during the hold-up. Yet, the same witness Murphy, in order to avoid recognition, crouched down in the truck and therefore could not see anything that took place on Eighth Street. Consequently, any attempt to distinguish between "general subject matter" and "specific subject matter" is totally unwarranted. The hearsay rule applies to all statements and the impact on the jury of the admission of hearsay statements in the instant case cannot be measured retroactively. However, under the particular facts it is safe to assume that the impact was not insignificant because it went directly to the credibility of the alibi evidence offered by each of appellants. Accordingly, the admission of such hearsay evidence was clearly erroneous.

IV.

Appellee relies entirely on legalistic justifications to find support that the sentence imposed on appellant Barringer in this case does not constitute cruel and unusual punishment. However, it fails to recognize that changes in the approach to the purposes and aims of incarceration and progress in the science of penology calls for a review of the scope of the rights guaranteed under the Eighth Amendment which should not be considered in vacuo but rather in relation to the accomplishments sought to be achieved. In this light, the de facto life imprisonment of appellant constitutes cruel and unusual punishment within the contemplation of the Eighth Amendment.

CONCLUSION

WHEREFORE, it is respectfully submitted that the decision of the District Court should be reversed.

Respectfully Submitted,

Paul M. Craig, Jr.
Attorney for Appellants

909 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

333-0990

September 19, 1968

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief were hand-delivered to the Office of the U. S. Attorney, Room 3136-C, United States Court House Building, 3rd and Constitution Avenue, N. W., Washington, D. C. 20001, this nineteenth day of September, 1968.

By _____
Paul M. Craig, Jr.

ISSUES PRESENTED *

In the opinion of the appellee, the following issues are presented:

1) In a case arising before June 12, 1967, and tried in July, 1967, where the fairness of pre-trial identifications was questioned in but not decided by the District Court, should the case be remanded for a full hearing into the circumstances of those identifications and their effect upon the trial?

2) After appellants had been identified by a witness, was it a violation of their Fifth Amendment rights to dress them in clothes worn by the robbers and found in their car?

3) Was inadmissible hearsay introduced when two witnesses testified that a third "called out the license number" and that third person was a witness and related what the number was?

4) Did the trial court impermissibly sentence appellant Barringer to a term of imprisonment within the statutory limits and fix that sentence to run consecutive to another sentence previously imposed for completely separate offenses?

---

* These cases have not been before this Court previously.

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,444

JOHN F. ALLEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,445

JOHN L. BARRINGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed December 29, 1966, both appellants were charged with robbery and two counts of assault with

a dangerous weapon, appellant Allen was charged with possessing a sawed-off shotgun, and appellant Barringer was charged with carrying an unlicensed pistol, the events arising out of the robbery of a liquor store on November 4, 1966. They were tried before Judge Howard F. Corcoran and a jury in July of 1967, were convicted on all counts, and have appealed the resulting sentences.

Shortly before 3:45 p.m. on November 4, 1966, Raymond Cunningham, owner of the Security Liquor Store at 3813 Georgia Avenue, N.W., and his employee Julius Murphy, noticed two men walking up the street outside the store. Mr. Murphy started to the back room for the pistol kept there, but before he could reach the gun the two men entered the store and commenced to rob it. (Tr. 7-12, 43-44, 50-51, 75-76, 136-38, 140-42.) One man, later identified by both witnesses as appellant Allen, pulled a stocking mask over his face as he entered the store. This robber carried a sawed-off shotgun and wore a green Army fatigue jacket. (Tr. 9, 11, 19, 27-28, 77, 79, 91-93.) This robber also sported an unusual moustache or beard described as a "Fu Manchu" type (Tr. 12, 58-59, 79, 148-49). The other man, identified by both victims as appellant Barringer, was dressed in a short windbreaker, had sunglasses, and was armed with a long barrelled pistol with white grips (Tr. 11-12, 19, 27-28, 78, 80, 91-93).

Appellant Allen escorted the victims to the back of the store at the point of the shotgun, while appellant Barringer attempted to open the register (Tr. 9, 12-13, 77). Unable to accomplish this task, Barringer called to Allen, who brought out Mr. Cunningham to open the register (Tr. 9, 13). The bandits took about $118 from the store and locked the victims in a walk-in cooler. Almost immediately, the witnesses escaped, Mr. Cunningham to call the police and Mr. Murphy to chase after the robbers. (Tr. 9-10, 14-15, 81-82.)

As Mr. Murphy reached the door of the store, he saw the two robbers proceeding up Georgia Avenue. He commandeered a truck and, with its occupants, Samuel Evans and Larry Williams, followed the two men up Georgia

Avenue to Randolph Street. As the two men turned right on Randolph Street, the pursuing truck continued up Georgia Avenue to Shepherd Street, where it too turned right and proceeded to 8th Street. There the followers saw the two men coming up 8th Street. At the corner of Shepherd and 8th Streets, the truck halted and Mr. Murphy ducked down so that the robbers could not see him. The witnesses saw the two men enter a brown and white 1955 Ford. (Tr. 81-87, 158-67, 196-201.) Mr. Williams took note of the license number of the car, 286-921, which he repeated for the benefit of his companions (Tr. 86, 88, 165, 168-69, 176-77, 199-200, 208-09).

Soon thereafter the witnesses related the license number of the Ford to a policeman who had responded to the liquor store, and a lookout for the car went out over the police radio (Tr. 169-70, 214-15). At about 4:05 p.m., Private Joseph Eberhard, who had heard the lookout, saw the car in question at Rhode Island and Florida Avenues, N.W., about 20 blocks from the robbery scene. (Tr. 216-20). He and his partner followed the car to the 400 block of Q Street, N.W., where the car turned right. At 1st and Q Streets, other police vehicles began to converge on the wanted car, which drove over the sidewalk (thus avoiding some stopped cars) and down Q Street at a high rate of speed. A chase ensued, terminating when the brown Ford crashed at 6th and Morris Streets, N.E. (Tr. 220-22.) The passenger, appellant Allen, jumped out as the car was still moving and was quickly apprehended by Officer Eberhard and his partner (Tr. 222-24). The driver, appellant Barringer, also jumped out of the car, to scale a chain-link fence into the grounds of Gallaudet College. He too was arrested shortly thereafter, by Officer O. H. Taylor, hiding behind some bushes on the College property. (Tr. 223-24, 301-05, 307.)

In the abandoned Ford were found a sawed-off shotgun containing a live shell (Tr. 227-28, 233-34, 286-89), identified as similar to that used in the hold-up (Tr. 17-18, 80), a .22 caliber target pistol with white grips (Tr. 228-29, 286-89), identified as similar to that wielded by

appellant Barringer during the robbery (Tr. 18, 80), an Army field jacket (Tr. 229, 286-89), identified as that worn by appellant Allen during the crime (Tr. 18, 80-81), another jacket (Tr. 229, 286-89), identified as like that worn by appellant Barringer during the robbery (Tr. 18), two pairs of sunglasses (Tr. 235-36, 286-89), two hats, Halloween masks, an overcoat, two nylon stocking caps (Tr. 237, 286-89), a box of .22 caliber ammunition, and a monitor radio (Tr. 234-35, 286-89). In the Army jacket pocket the police found another stocking cap (Tr. 237, 286-93) and $106.84 (Tr. 229-32, 286-89). A fourth stocking was found in the area where appellant Allen had abandoned the automobile (Tr. 237, 286-89). In appellant Allen's pocket there were seven live .22 caliber bullets (Tr. 225-26, 286-89).

It was stipulated that appellant Barringer did not have a license to carry a pistol in the District of Columbia on November 4, 1966 (Tr. 321).

Appellants' defense was alibi. Appellant Barringer testified that he had spent the afternoon of November 4, 1966 playing basketball at the McFarland Playground with "Cliff" and "Cornbread". He said that he was walking downtown on Georgia Avenue and had cut over to Eighth Street on Randolph when he happened to see two people using his car, the brown Ford, which he had parked the night before at Kindom Place and P Streets. He claimed that he called to the two fellows, who then ran. Upon entering the car, he discovered that it had been hotwired. Barringer asserted that he then started driving downtown and that a few blocks from New Hampshire Avenue he picked up the co-defendant Allen. As they were driving along, he noticed the police car and wagon nearby. Appellant explained the subsequent chase by a "deathly" fear of police and of incarceration, which prompted him to flee when he realized he did not have a driver's license. Appellant claimed he did not see any guns, coats, or money in the car. (Tr. 328-34, 335, 339-41, 345-53.)

It was stipulated between counsel that the Ford in question was registered to one Michael Patrick King on November 4, 1966 (Tr. 381-82).

Appellant Allen testified that on the afternoon of November 4, 1966, he was home with three friends, two of whom were also witnesses at the trial. At about 3 p.m. they left Allen's home, to visit one Frank Twitty at Georgia Avenue and Decatur Streets. Twitty was not home and there was some conversation with his grandmother, also a witness. Thereafter, as the three were walking down Georgia Avenue, Barringer came by in his car and picked up Allen. Allen claimed that he had not run from the police after the car crashed, but rather stood by the car until he was arrested. He disclaimed knowledge of the weapons and other instrumentalities and fruits of crime found in the car, and also of the bullets found in his pocket, which he asserted had been found in the car instead. Allen also testified that he did not have a Van Dyke at the time but merely a long moustache. This latter claim apparently was belied by the photograph of appellant Allen taken that day. (Tr. 367-371/6, 371/14-17, 371/19, 371/26-30, 371/36-70, 375-80.)

ARGUMENT

I. The case should be remanded for a full hearing into the circumstances surrounding the out-of-court identifications of appellants and a determination by the trial court of the propriety of those identifications and of the subsequent in-court identifications.

(Tr. 10, 12, 19, 20, 22, 25-28, 38, 43, 44-51, 58-60, 62-71, 79-91, 119-24, 136-38, 141-42, 149-50, 151-57)

When during the direct examination of the first Government witness, Mr. Cunningham, the time came for him to identify appellants, defense counsel directed the attention of the trial court to the then-recent cases of *United States* v. *Wade*, 388 U.S. 218 (1967) and *Stovall* v. *Denno*, 388 U.S. 293 (1967). After a brief review of those decisions, the trial court ruled that neither case applied to

confrontations occurring prior to June 12, 1967. Accordingly, no hearing was held out of the presence of the jury to examine the circumstances of the identifications by the witnesses at the Robbery Squad. (Tr. 21-25.)

It is plain that the counsel requirement of *Wade* does not apply to confrontations occurring prior to June 12, 1967, the date of that decision. *Stovall* v. *Denno*, *supra*; *Wright* v. *United States*, No. 20,153 (January 31, 1968); *Borum* v. *United States*, No. 20,270 (December 21, 1967) and cases cited. Since the confrontation in the instant case took place in November of 1966, *Wade* is patently inapplicable, as the trial judge held.

Stovall, however, holds that in some circumstances the presentation of a suspect in custody to a witness may be "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant is] denied due process." 388 U.S. at 302. When such an objection is made to the testimony of a witness, the trial court should conduct a hearing to determine whether under all the circumstances the confrontation was violative of due process. In such a proceeding the burden is on the defendant. See *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). Moreover, even if the court finds the out-of-court identification unfair, it may still permit the witness to identify the defendant in the courtroom if it finds the witness' recollection unaffected by the improper procedure. *United States* v. *Wade*, *supra*, 388 U.S. at 240-42; *Gilbert* v. *California*, 388 U.S. 263, 272 (1967); *Wright* v. *United States*, *supra*. These rulings should be made by the trial court, who hears the witnesses and determines credibility. See, *e.g.*, *Kelly* v. *United States*, D.C. Cir. Nos. 20,533, 20,544 (March 11, 1968) (unreported order).

In this case, counsel did interpose a due process objection to the testimony of Mr. Cunningham (Tr. 22, 25).[1] Undoubtedly because of the newness of the *Wade* and

[1] Although no objection was made to Mr. Murphy's testimony identifying appellants, we assume that this was because of the court's prior ruling that neither *Wade* nor *Stovall* applied to this case.

Stovall cases, which were contrary to prior decisions of this Court, the trial court did not conduct a hearing on this question. Accordingly, the cause should be remanded in order that a full inquiry may be made into the circumstances of the identifications and into the question whether the witnesses' recollections at the time of trial were affected by the Robbery Squad confrontations.[2] See *Jones* v. *United States*, D.C. Cir. No. 21,381 (opinion rendered September 3, 1968); *Smith* v. *United States*, D.C. Cir. No. 20,773 (June 7, 1968); *Wright* v. *United States*, *supra*.

Moreover, there is in this case the strong possibility that the trial court may find that introduction of the eyewitness identification testimony, if error, was harmless beyond a reasonable doubt.[3] Even without that testimony the evidence against appellants easily may be described as overwhelming, for they were found in the getaway car within twenty minutes after the robbery, fled upon the approach of the police, and when apprehended moments later were found in possession of the fruits and instrumentalities of the crimes.

---

[2] There is some testimony in the record regarding what occurred at the Robbery Squad office (Tr. 25-28, 44-50, 62-71, 119-24, 151-57) and there is also some indication of the factors upon which the witnesses based their identifications (Tr. 10, 12, 19, 20, 38, 43, 50-51, 58-60, 71, 79-91, 123, 136-38, 141-42, 149-50). However, because the propriety of that identification procedure and its effect, if any, upon the ability of the witnesses to recognize appellants at trial, were not litigated below, the record is incomplete. For example, the witnesses did not verbalize precisely how they recognized appellants, nor did they state whether the Robbery Squad confrontations affected their memories of how the robbers looked during commission of the crimes. Accordingly, as the cases cited indicate, a remand is appropriate.

[3] *Gilbert* v. *California*, *supra*, 388 U.S. at 274; *United States* v. *Wade*, *supra*, 388 U.S. at 242; *Wright* v. *United States*, *supra*; *see Chapman* v. *California*, 386 U.S. 18, 24 (1967).

II. It was not improper for the police to dress appellants in clothes found in their car, during the Robbery Squad confrontation.

(Tr. 70-71, 122-23, 154, 155-57)

While Mr. Murphy was in the Robbery Squad office on the night of November 4, 1966, appellants apparently were asked to put on the two jackets found in the car at the time of their arrest and identified as similar to those worn by the robbers (Tr. 155-57). Mr. Murphy had already identified the men, for he had seen them and recognized them as soon as he walked into the office (Tr. 122-23, 154). Appellants were not asked to dress in any special clothes while Mr. Cunningham was in the office (Tr. 70-71). Appellants now object to this procedure and claim that their privilege against self-incrimination was violated thereby. The argument is patently frivolous.

That appellants may have been dressed in clothes similar to those worn by the robbers would be a factor for the trial court to consider in determining whether the lineup was impermissibly suggestive. However, it is clear beyond peradventure that the Fifth Amendment is not violated when a suspect is asked to present his person for identification or to clothe it in particular garments. *Holt* v. *United States*, 218 U.S. 245, 252-53 (1910); *see Gilbert* v. *California*, *supra*, 388 U.S. at 266-67; *Schmerber* v. *California*, 384 U.S. 757 (1966); *cf. Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967) (not a violation of the privilege to require a suspect to speak for identification).

III. Testimony by two witnesses that a third witness "called out the license number" of a car was not inadmissible hearsay when the declarant testified to what that number was.

(Tr. 86, 88-89, 111, 165, 169-70, 177, 199-200)

Appellants also press the objection made at trial to the testimony of the witnesses Murphy and Evans that Larry Williams "called out the license number" of the getaway

car as the delivery truck passed by. (Tr. 86, 88, 111, 165, 169-70, 177). The trial judge overruled this objection (Tr. 88-89). We note that at no time did the prosecutor ask the witnesses Murphy and Evans what that number was; rather, defense counsel elicited the number itself from those witnesses during cross-examination (Tr. 111, 177). It was only of the witness who actually observed the tag number of the getaway car, Larry Williams, that the prosecutor asked what the number was (Tr. 199-200).

Hearsay, of course, is defined as a statement made out of court, offered to prove the truth of the matters contained in the statement. McCORMICK, EVIDENCE 460 (1954). Hearsay is usually excluded for several reasons: the statement made out of court is not under oath, there is no opportunity to cross-examine the out-of-court declarant and to test his credibility, and there is a danger of misreporting of the out-of-court statement. *Id.* at 457-59. In the instant case, Mr. Williams was present at trial, testified to the tag number that he saw on the getaway car, and was cross-examined. Accordingly, assuming *arguendo* that there were some elements of hearsay in the testimony of the witnesses Murphy and Evans as to the general subject matter of Williams' statement, any conceivable error in admitting that testimony would have been harmless. In any event, we do not believe that the hearsay rule excludes testimony as to what the general subject matter of a conversation was, if the witness does not testify about the substance of that conversation.

IV. The sentence imposed on appellant Barringer in this case does not constitute cruel and unusual punishment.

Appellant Barringer contends finally that the five-to-fifteen year sentence imposed on him in this case on the robbery count (sentences on all other counts are to run concurrently) constitutes cruel and unusual punishment in violation of the Eighth Amendment, since the sentence is to run consecutive to a different sentence already being served. This argument is without merit.

The prior sentence, imposed in Criminal Case No. 509-66 and affirmed by this Court (D.C. Cir. No. 21,020) (March 12, 1968), totals twelve to thirty-six years. Contrary to the implication in appellant's Brief at 19, the crimes involved in that case were far more serious than merely the killing of a police dog. Specifically, appellant there was sentenced consecutively on two counts of robbery, one count of assault with intent to kill, and one count of destroying property (the killing of the dog). Sentences on counts charging assault with a dangerous weapon, assault on a police officer, and carrying a dangerous weapon are to run concurrently. The offenses involved in that case occurred in ~~September,~~ 1966, ~~two~~ 7 months before the instant robbery and assaults.

It is well settled that separate and consecutive sentences may be imposed for separate and distinct offenses. *Jones* v. *United States*, 117 U.S. App. D.C. 169, 327 F.2d 867 (1963); *Anthony* v. *United States*, 331 F.2d 687, 693-94 (9th Cir. 1964); *Pependrea* v. *United States*, 275 F.2d 352 (9th Cir. 1960); *Ellerbrake* v. *King*, 116 F.2d 168 (9th Cir. 1940); *Gurera* v. *United States*, 40 F.2d 338, 340 (8th Cir. 1930); *see Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 345 F.2d 964, *cert. denied*, 382 U.S. 894 (1965). Appellant is not facing life imprisonment for any one offense. Each sentence imposed is within the statutory maximum, and the sentences are for separate and distinct offenses, occurring at different times and places. Surely Congress did not contemplate that a person receiving the maximum sentence for one offense could not be subject to additional penalties for offenses committed subsequent to that crime. Such a rule would permit subsequent offenses to be committed with impunity, hardly a desirable result. Appellant's only recourse is a motion to reduce sentence, which he may file with the trial court. Fed. R. Crim. P. 35; *Jones* v. *United States, supra; Pependrea* v. *United States, supra; Gurera* v. *United States, supra.*

CONCLUSION

WHEREFORE, it is respectfully submitted that the case should be remanded for a hearing to determine the circumstances surrounding the out-of-court identifications of appellants. If no error is found in that procedure or in the courtroom identifications, or if any error is found to have been harmless, then the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NICHOLAS S. NUNZIO,
CAROL GARFIEL,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 319100 168